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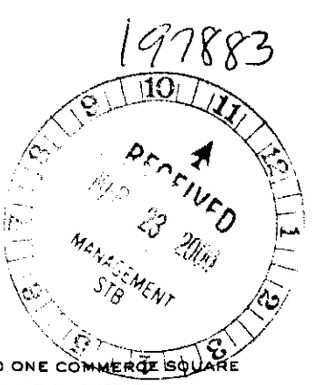

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EXPEDITED HANDLING REQUESTED

March 23, 2000

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
ATTN: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, D.C. 20423-001

Re: Public Views on Major Rail Consolidations (STB Ex Parte No. 582)

Dear Mr. Williams:

We wish to correct and supplement the Petition of Canadian National Railway For Stay Pending Judicial Review filed yesterday. At page 7, footnote 10, the second sentence following the citation is a repetition of the first and should be deleted. In addition, we wish to supplement that footnote by adding the following sentence: "As construed by the Board, section 721(b)(4) would constitute an unlawful delegation of power for it embodies no intelligible principle to limit the Board's exercise of authority."

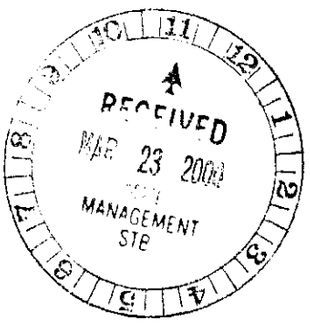
We have enclosed new copies which reflect these changes.

For the Board's convenience, we are also enclosing copies of the brief of Union Pacific quoted in footnote 3.

Very truly yours,

Paul A. Cunningham

Enclosures



EXPEDITED HANDLING REQUESTED

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

PETITION OF CANADIAN NATIONAL RAILWAY COMPANY FOR STAY PENDING JUDICIAL REVIEW (CORRECTED AND SUPPLEMENTED)

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March 23, 2000

PETITION FOR STAY PENDING JUDICIAL REVIEW

Pursuant to the Board's Rules of Practice, 49 C.F.R. § 1115.5, Canadian National Railway Co. ("CN") hereby petitions for a stay pending judicial review[1] of the Board's decision served March 17, 2000 ("Decision"). Rather than repeating positions stated in BNSF's petition for a stay, CN will supplement BNSF's arguments.

INTRODUCTION

The Board's moratorium is not authorized by statute. It conflicts with the approach to control transactions prescribed by Congress in the Interstate Commerce Commission Termination Act ("ICCTA") because it makes the strict timetables that ICCTA imposed on the Board meaningless.

Harmful consequences follow from the Board's ultra vires order. The Board has frozen the competitive structure of an entire industry for at least two to three years, causing irreparable injury to CN, BNSF, and their shippers. The moratorium is overbroad in relation to the service problems that are the Board's motivating concern; and may have unconstitutionally bound and gagged railroad managements through a catch-all prohibition. By failing to differentiate between the service and other characteristics of the Class I carriers that support a moratorium and BNSF and CN, which oppose it, the Board is protecting competitors in an anti-competitive fashion.

All of this is unnecessary. The Board's normal processes, carefully applied, enable it to reach results in the BNSF/CN docket that properly respond to immediate concerns. The Board, for example, has the means to constrain another "round" of consolidations during its rulemaking without foreclosing the opportunity to hear whether a particular consolidation is in the public interest. In these circumstances, each of the four factors that the Board has identified for a stay pending judicial review has been satisfied.[2]

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[1]CN filed a petition for review of the Board's decision on March 17, 2000 (D.C. Cir. No. 00-1118), as did BNSF (D.C. Cir. No. 00-1120) and the Western Coal Traffic League (D.C. Cir. No. 00-1115). CN also intends to file a motion with the Court of Appeals for stay of the Board's decision. The Board's action on this stay petition may make unnecessary the relief to be sought from the court.

[2]See Union Pac. Corp. – Control and Merger – Southern Pac. Corp., STB Finance Docket No. 32760 (Sub-No. 36), slip op. at 1 (STB served Oct. 29, 1999) (granting stay).

I. UPON JUDICIAL REVIEW, CN IS LIKELY TO PREVAIL ON THE MERITS

A. The Board Does Not Have The Statutory Powers It Claims

The Decision conflicts with the ICCTA scheme of deadlines and procedures embodied in 49 U.S.C. §§ 11324 and 11325. It is an unlawful exercise of authority unless the Board has other authority that "trumps" the ICCTA scheme.

There is, however, no such other authority. The substantive provisions cited as authority in the Decision, subsections (a) and (b)(4) of 49 U.S.C. § 721, are ancillary to the Board's explicit statutory powers, and for reasons substantially set forth in BNSF's petition, provide no authority for the Board's action. The Board has cited no explicit statutory power that it is "carrying out," as would be required to invoke section 721(a), or as to which its moratorium order is "necessary" and "appropriate," as required by section 721(b)(4). The moratorium is thus unlawful, "[r]egardless of how serious the problem an administrative agency seeks to address." FDA v. Brown & Williamson Tobacco Corp., No. 98-1152, slip op. at 1 (U.S. Mar. 21, 2000).[3]

The Board did cite the Rail Transportation Policy ("RTP") as the statutory source of the interests with respect to which it was acting to prevent "irreparable injury." See Decision at 9-10. The RTP, however, can be implemented only through the substantive regulatory provisions of the Act; it is a measure of the correctness of the Board's exercise of its regulatory powers, but it is not a source of such powers.[4] The Board does not have plenary authority outside of any particular regulatory provision to implement the RTP directly, whether as an exercise of ancillary powers or otherwise to prevent "irreparable injury." For example, the Board could not initiate a rulemaking to implement the RTP directly; it could only issue rules to implement

---

[3] See also Brae Corp. v. United States, 740 F.2d 1023, 1059 (D.C. Cir. 1984) ("discretionary powers surely do not evade the explicit requirements . . . that reflect a specific set of Congressional concerns"), cert. denied, 471 U.S. 1069 (1985).

[4] See Petition to Disclose Long-Term Rail Coal Contracts, Ex Parte No. 387 (Sub-No. 961), 1988 ICC Lexis 222 at *16 (RTP "represents broad policy goals to be considered when performing our regulatory role. . . . [E]ach rail provision is to be read with the RTP in mind.").

particular regulatory provisions.[5] Most certainly, the policies in the RTP "do not supersede specific provisions of the statute." Petition to Disclose Long-Term Rail Coal Contracts, supra, at *16. Thus, the Board can properly take the RTP into account in deciding whether to amend its control-transaction rules and in applying the "public interest" standard of section 11324(c) to particular transactions. The RTP does not authorize the Board to "supersede specific provisions of the statute" that govern the timetable for its consideration of such transactions. Id.

B. The Board Has Improperly Invoked Section 721(b)(4)

Section 721(b)(4) is simply not a freestanding authority to prevent whatever the Board may deem to be irreparable injury. In DeBruce Grain, Inc. v. Union Pac. R.R., STB Docket No. 42023 (STB served Apr. 27, 1998), the Board (agreeing with Union Pacific),[6] stated that the criteria for exercising its authority under section 721(b)(4) are the same as those governing preliminary injunctions; it rejected the "narrow view" that irreparable harm is the only relevant consideration. The criteria include the movant's likelihood of success on the merits, *i.e.*, the merits of the pending adjudicative proceeding in which the order is issued. Id. at 3 n.7. Prior to the Decision, the ICC and the Board had issued such relief only where sought by movants in particular adjudications. Here, the Board's "unprecedented" (Decision at 10) Decision was issued solely in the context of Ex Parte No. 582, which is a public hearing, not an adjudication, and without any

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[5]Global Van Lines v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983) (noting with reference to predecessor to RTP that"general congressional exhortation to 'go forth and do good,' without more, is not a proper foundation for the sound development of administrative law").

[6]As UP correctly stated to the Board in that case: "The way DeBruce is reading new Section 721(b)(4) would mean that the section has vastly expanded the Board's ability to regulate rail transportation as compared to the ICC's. Indeed, under DeBruce's view of Section 721(b)(4) the Board could issue an administrative injunction even if there were no violations of the Act's substantive provision (the practical equivalent of eliminating the requirement for a 'likelihood of success on the merits'). There is not a shred of support in the statute or its legislative history to support the notion that such a vast expansion of rail regulation was being enacted or intended. In fact, such a construction would be contrary to the overall thrust of the ICC Termination Act, which was to reduce regulation of railroads. . . ." Reply of Union Pacific Railroad Company to Motion For Emergency Order, at 6-7 (Nov. 14, 1997) (emphasis in original citing legislative history).

assessment of a movant's likelihood of success on the merits of a particular claim. Indeed, the fact that there could be no such assessment in the present context (what merits? whose likelihood of success? in what proceeding?) demonstrates that the Board has attempted to invoke section 721(b)(4) in an inappropriate context.

Moreover, by its terms, section 721(b)(4) does not excuse the Board from any provision of law other than the cited provisions of the Administrative Procedure Act, which concern procedural requirements for agency rulemaking and formal adjudication. Section 721(b)(4) provides no basis for the Board to override directly or indirectly the mandatory statutory framework that ICCTA established for expeditious review of control applications, which imposed specific time requirements. See Post-Hearing Comments of Canadian National Railway Co. in Ex Parte 582.[7]

C. As A Section 721(b)(4) Order, the Decision Is Procedurally and Substantively Defective

Even if section 721(b)(4) provided freestanding authority, the Decision would still be procedurally defective. There was no prior notice or opportunity to address that provision of the statute and its requirements. And while a finding of "irreparable injury" is by its nature forward-looking, the Board has acted here not upon evidence but upon speculations derived from contradictory and otherwise implausible assertions that cannot support such a finding. Thus, for example, the Decision relies upon threats by CN's competitors that amount to this: during the pendency of the BNSF/CN proceeding, those competitors would expend their management energies in the consideration or pursuit of transactions that could have little or no hope of Board approval because they are contrary to the interests of their shippers and the public. Further, this finding accepts the contradiction in the assertions of the competitor railroads: that they will be forced to focus on their own mergers but that mergers are unnecessary in order to bring to shippers most of the

[7]Prior to enactment of ICCTA, the ICC declined to defer decision in one control proceeding to await the results of a battle between UP and BN for control of Santa Fe because it could not be done consistently with the then-existing statutory deadlines. Union Pac. Corp. -- Control -- Chicago & N.W. Transp. Co. Finance Docket No. 32133, Decision No. 25 at 60-61 (ICC served Mar. 7, 1995).

benefits that mergers bring.[8] And it simply ignores the uncontradicted evidence that the railroad industry is having no difficulty raising the debt capital that it needs for continuing investment in rail assets.

Moreover, even if authorized and procedurally proper, the Decision is substantively defective. First, the moratorium is overbroad (and thus neither "necessary" nor "appropriate") insofar as it applies to the application to be filed by CN and BNSF, and for that reason alone it is arbitrary and capricious. If the Board believes it has the power it exercised in the Decision, to avoid the reactions that other railroads might have to the BNSF/CN proposal, it was only necessary to exercise that power against those railroads who sought Board action to prevent them from considering follow-on combination possibilities until at least a number of years had passed. The Board's perceptions that it faces "not ordinary circumstances" and that the moratorium is "unprecedented" only heightens the need to limit in this way what might otherwise be an overreaction, particularly in light of the undeniably anticompetitive consequences of a moratorium. Those consequences make it all the more essential that any action be no broader than necessary.

The Board sought to justify its moratorium order on the grounds that "the rail community is not in a position to now undertake what will likely be the final round of restructuring of the North American railroad industry, and . . . our current rules are simply not appropriate for addressing the broad concerns associated with reviewing business deals geared to produce two transcontinental railroads" (Decision at 2). Of course, the BNSF/CN combination is not necessarily part of such a "final round." And the radical step of a moratorium was not needed to deal with these concerns; the Board has more measured means, which it did not choose.

The Board could have confirmed that, in applying the public interest standard to the BNSF/CN application and any future applications, it would examine the possible effects of the transaction on the service of other carriers; the current service levels of the applicant carriers; the reasons for expecting that the

---

[8] In conflict with its "distraction" rationale based on the BNSF/CN control proceeding, the Board has invited pervasive distraction by proposing a prolonged rulemaking that invites reopening of a number of issues that had been settled by prior decisions.

applicant carriers will implement the proposed transaction without major service disruptions (as to which their performance in implementing prior mergers would be relevant and material); and the financial ability of the applicant carriers to carry out the integration measures contemplated by the application and to continue to invest after the transaction.

The Board could have stated that negative findings as to these factors will make it unlikely that the Board would conclude that the transaction is in the public interest, absent an extraordinary showing of countervailing public benefits. Such an announcement would, as a practical matter, make it highly unlikely that UP, CSX or NS would apply for control authority during the next 15 months, that there would be another "round" of control proceedings, or that the Board would be presented with an application to create the first of what might be only two transcontinental US railroads. This announcement would, of course, be consistent with the Board's Decision No. 1A in the BNSF/CN docket, in which it stated that it would take into account "downstream effects."

Neither of the above alternatives would preclude the Board from initiating a rulemaking to consider issues that may be posed by transcontinental U.S. mergers, and any other issues relating to control proceedings. Should the rulemaking reveal an additional element of the public interest not limited to proposals for transcontinental railroads, the significance of that new element for the BNSF/CN proceeding, and how that element should be applied, it can be dealt with in that proceeding. If CN and BNSF are willing to take that regulatory risk, it is not reasonable for the Board to refuse them a hearing.[9]

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[9]There would be nothing new in a rulemaking proceeding to amend the Board's rules for control proceedings during the pendency of an individual control proceeding. That has occurred repeatedly since the Staggers Act. See, e.g., Ex Parte No. 282 (Sub-No. 19) (STB served Nov. 24, 1999) (terminating proposed rulemaking in effect during BN/Santa Fe, UP/SP, CSX/NS and CN/IC proceedings); Railroad Consolidation Procedures, 366 I.C.C. 75 (1982)) (adopting final rules during pendency of UP/MP/WP proceeding). Moreover, similar risk is always present in a control proceeding; witness, for example, the additional requirements concerning new competition in the CSX/NS proceeding, and the growth of requirements concerning environmental protection and safety.

Second, the moratorium is also at odds with the First Amendment.[10] The order directs all Class I railroads to "suspend activity relating to any railroad transaction that would be categorized as a major transaction." It raises fundamental constitutional questions to the extent it precludes a wide range of activities that may arise over time, including the following illustrative list:

- Seeking Congressional or Executive Branch support for action to nullify the Decision and to allow the BNSF/CN transaction to be timely reviewed and approved.
- Fulfilling existing contractual obligations related to potential major control transactions, such as the holding of shareholder meetings and votes.
- Informing shareholders or other stakeholders of the state of a pending or potential future major control transaction.
- Unilaterally studying possible major control transactions (as UP apparently did as to CP), including studies of the potential impacts of alternative control transactions in comparison to each other and to the status quo to determine which might best promote the financial health of the industry and improve service to shippers.
- Developing or communicating plans for the period during and following the moratorium that would relate to a major control transaction.
- Communicating with any party, including employees, carload and intermodal customers, federal, state, and local officials, shareholders, potential investors, consultants, bankers, other railroads, and the media about plans that would or might entail a major control transaction or a response to a major control transaction.
- Developing mechanisms to increase environmentally beneficial competition with trucks that would depend on or relate to a major control transaction.[11]
- Discussing or entering into financial and other contractual arrangements with non-railroad parties or changing charter provisions in anticipation of offensive or defensive strategies with respect to one or more future control transactions.

II. THE BALANCE OF HARDSHIPS FAVORS CN

A. CN and The Public Interest Will Suffer Irreparable Harm Absent A Stay

Courts have recognized that irreparable harm results inherently "as a matter of law" from delay in

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[10] E.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). Action that trenches upon such constitutionally protected interests is subject to a higher level of scrutiny and bears a heavier burden of justification. As construed by the Board, section 721(b)(4) would constitute an unlawful delegation of power for it embodies no intelligible principle to limit the Board's exercise of authority.

[11] The Decision (at 11) concluded with the boilerplate statement that it will not significantly affect the environment or conservation of energy resources. However, there is no evident basis for such an assertion about deferral of a transaction that can be expected, e.g., to reduce the volume of truck traffic. See 42 U.S.C. §§ 4321 et seq.

corporate control transactions.[12] For example, laws that delay tender offer processes in conflict with Congressionally imposed time limitations inherently give rise to irreparable injury, because delay is precisely the harm that Congress sought to avoid. See Kennecott, 637 F.2d at 188-89.

With respect to railroad control proceedings in particular, Congress, protecting both public and private interests, made clear in the 1976 and 1980 amendments to the Interstate Commerce Act, and reaffirmed in ICCTA, that delay in railroad control proceedings is intolerable. Congress recognized that complex control transactions are highly time-sensitive, which is why it left timing to private initiative; and if there are shipper benefits to be had, delay means that they are irretrievably lost. The injuries occasioned by the Board's sweeping prohibition are both concrete and inevitable.

Moreover, infringement of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); Branch v. FCC, 824 F.2d 37, 40 (D.C. Cir. 1987).

B. A Stay Will Not Harm The Public Nor Other Parties

The Board's Decision purports to base the imposition of the moratorium on certain supposed "harms" to the railroad industry and, even more tenuously, to the public at large. There is no basis for this theory. Congress determined that a prompt and fair hearing was in the public interest. A large majority of the shipper participants in Ex Parte 582 wanted BNSF/CN to be judged on the record after a prompt and fair hearing; few, if any, shippers claimed they would be harmed by a fair hearing. And it is hard to imagine any party other than the railroads seeking the Board's protection from competition which would seriously contend that it would somehow suffer cognizable harm if the Board were to abide by the time limitations imposed

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[12] See, e.g., Hyde Park Partners, LP v. Connolly, 839 F.2d 837, 853 (1st Cir. 1988) (substantial and irreparable harm would arise from enforcement of statute imposing one-year moratorium on corporate takeover attempt as sanction for noncompliance with statute's disclosure provisions); San Francisco Real Estate Investors v. Real Estate Inv. Trust, 701 F.2d 1000, 1002-03 (1st Cir. 1983); see also Kennecott Corp. v. Smith, 637 F.2d 181, 188-89 (3d Cir. 1980) (delay in control transaction "in and of itself constitutes irreparable injury"); cf. Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 164 (3d Cir. 1999) (loss of opportunity to pursue merger is irreparable injury).

by Congress in considering control transactions while concurrently conducting a rulemaking relating to control transactions.

As discussed above, BNSF and CN would not be harmed by parallel proceedings that complied with the Congressional deadlines, and neither would the other Class I railroads. The Board asserts that other Class I railroads will focus on fashioning "strategic responses" to the BNSF/CN control application and not on addressing the service problems that continue to prejudice their customers. Decision at 3-4, 5, 7, 8. This supposed "distraction" harm is not plausible. It rests on contradictory and otherwise implausible assertions by other railroads eager to receive the protection the moratorium affords them from the increased competition they correctly anticipate from a BNSF/CN combination. In any case, as described above, the Board has other means to prevent injurious or ill-considered follow-on mergers. Those means are sufficient to meet the Board's findings concerning this supposed distraction and shift in management priorities, which related primarily to another "round" of applications, or to applications seeking to create one or more U.S. transcontinental railroads. See Decision at 3-4, 5, 7, 8, 9. Otherwise, since these railroads have never before shown a reluctance to participate in a competitor's transaction proceeding, and no showing was made in Ex Parte 582 that their prior participation had been "distracting," there should be no need for the Board to be concerned that these railroads will be distracted by participation relating to the BNSF/CN application alone. That would certainly be the case if the Board were to take the simple steps that would assure that, until the other railroads have their service and finances back in order, their "responsive" applications are not practical options.

C. A Stay Is In The Public Interest

A stay would serve the public interest. There is a Congressionally emphasized public interest in the acceptance and prompt consideration of control applications. The public interest would be disserved by broadly forbidding the railroads from engaging in activities, separately or jointly, that could improve service and increase efficiency through control transactions.

CONCLUSION

The Board should stay its Decision pending judicial review and, upon filing by BNSF and CN of their application, reach a decision on the merits within the 16-month period prescribed by statute.

Respectfully submitted,

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Attorneys for Canadian National Railway Company

March 23, 2000

CERTIFICATE

I hereby certify that on this 23rd day of March 2000, I caused a copy of the foregoing Petition of Canadian National Railway Company for Stay Pending Judicial Review (Corrected and Supplemented) to be hand-delivered to the following:

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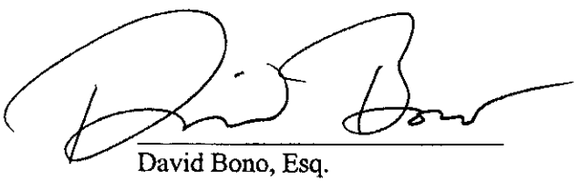

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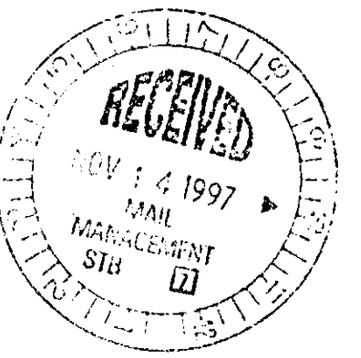
183883

BEFORE THE
SURFACE TRANSPORTATION BOARD



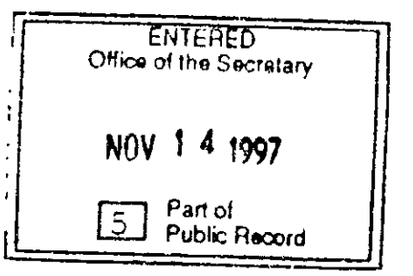
DOCKET NO. NOR 42023

DEBRUCE GRAIN, INC.

V.

UNION PACIFIC RAILROAD COMPANY

REPLY OF UNION PACIFIC RAILROAD COMPANY TO MOTION FOR EMERGENCY ORDER



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Attorney for
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Dated November 13. 1997
Due: November 23. 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42023

DEBRUCE GRAIN, INC.

V.

UNION PACIFIC RAILROAD COMPANY

REPLY OF
UNION PACIFIC RAILROAD COMPANY
TO
MOTION FOR EMERGENCY ORDER

I.

INTRODUCTION

This reply is filed on behalf of Union Pacific Railroad Company ("UP"), defendant in the above proceeding. It is in response to a motion filed by Complainant DeBruce Grain, Inc. ("DeBruce") on or about November 3, 1997.

A. Background.

This proceeding involves a challenge to UP's current car allocation practices for grain cars. As explained in the accompanying Reply Verified Statement of Drew Collier ("RVS Collier"), UP's Vice President and General Manager-Agricultural Products, attached at Tab 1. UP has several different car allocation programs. The two which are relevant are the "Guaranteed Freight Pool" ("GFP") and the "Car Voucher" program. The GFP program involves UP's sublease of shipper private cars. The shipper then receives a guarantee

from UP that is provided in the tariff. The guarantee is that UP will place 1.4 times the number of cars a shipper has in the program at the shipper's facilities or will pay a $250.00 per car penalty for cars not delivered on time, if the shipper cancels the underlying order. The shipper is also permitted to roll late orders forward into future shipping periods, which is what DeBruce has been doing. In this case, no penalty is paid unless the orders are subsequently canceled. (RVS Collier, p. 2).

The "Car Voucher" program is an auction system, roughly similar to the BN "COTS" program. UP makes groups of cars for future delivery available at a weekly auction. Winners are selected based on the highest bids for the cars or groups of cars offered. UP guarantees to place the number of cars covered by the voucher in the relevant half month period. If the cars are not placed on time, UP pays the voucher holder a penalty of $50 per car for each day the car is late, to a maximum of $400.00. Unlike the GFP penalties, the voucher penalties may be claimed without canceling the underlying orders. (RVS Collier, p. 3).

In recent months, the velocity of UP's covered hopper fleet has declined significantly. The reason is the congestion problems on UP, which have been well documented. The decrease in velocity has had the effect of decreasing grain car availability by 30-40%. As a result, UP has not had enough cars to fill all of its car orders.

The present dispute with DeBruce concerns the way in which UP is allocating grain cars to voucher shippers and to GFP shippers in order to deal with the decreased car availability. UP is attempting to fill all of these orders, but it is giving priority to the voucher orders. The reason for this policy is explained in Mr. Collier's statement. (RVS

Collier. p. 5). The effect of this policy is that GFP car orders (including DeBruce's GFP orders) being filled 30-60 days late while voucher orders (including DeBruce's voucher orders) are being filled on a more timely basis.

What DeBruce is challenging is this proceeding is UP's prioritization of voucher orders. According to DeBruce, this policy is contrary to the underlying tariff and to various provisions of the Interstate Commerce Act. DeBruce's motion requests that the Board issue an order under 49 U.S.C. § 721(b)(4) directing UP to change its current grain car allocation practices so as to (1) give covered hopper cars ordered under UP's "Guaranteed Freight Pool Program" ("GFP") the same priority as is given to cars ordered under UP's "voucher program", (2) require UP to place empty covered hopper cars at DeBruce's three Nebraska facilities and (3) move loaded cars from those facilities with the "same level of responsiveness" as UP places or pulls cars at "other elevators in the same vicinity" (Motion. pp. 6-7). DeBruce argues, in support of this motion, that the Board can issue an order under Section 721(b)(4) solely upon a showing of "irreparable harm". In other words, it does not matter whether the relief being requested by one party harms hundreds of other shippers, or that there is no merit to a party's substantive claims. So long as some sort of "irreparable harm" is shown, the Board may grant relief.

As we will show below, DeBruce is not entitled to any relief under Section 721(b)(4). DeBruce's claim that the statute dispenses with the normal four-part standard

for injunctive standard for injunctive relief" is not supported either by the language of the statute, or its legislative history. DeBruce has failed to establish any part of the four part standard for injunctive relief. It has not established a "substantial likelihood of success on the merits" because UP's current allocation practices do not violate the underlying tariff or the statute. Second, DeBruce has not established "irreparable injury". Any injury there may be is compensable by money damages. Third, the requested order would clearly harm other parties. While the specific requirements of the order are vague, the effect it would have is not. It is designed to require UP to fill fewer car orders for some shippers (the shippers with voucher orders) in order to benefit other shippers (the shipper with GFP orders). This will unfairly harm shippers with voucher orders, who are not parties to this proceeding. Fourth, the requested order is clearly not in the public interest. UP's car allocation practices are lawful and fair. It would be completely inappropriate to summarily order sweeping changes to a railroad's car allocation practice which will affect hundreds of shippers not party to the proceeding, simply because one shipper feels it should be getting more cars.

B. The Prior Court Action.

This proceeding is a sequel to a recent proceeding brought by DeBruce in a Federal District Court, No. 97-1413-CV-W-3, DeBruce Grain, Inc. v. Union Pacific RR. (W.D. MO W.D.) In the court proceeding, DeBruce sought a temporary restraining order

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The four part standard consists of (1) likelihood of success on the merit, (2) irreparable injury in the absence of the requested relief, (3) lack of harm to other parties if the requested relief is granted, and (4) furthering of the public interest by a grant of the relief. See authorities cited at p. 4 of DeBruce's motion.

and preliminary injunctive relief against UP's current car service practices, making essentially the same claims as it is making in this Board proceeding. On October 30, 1997, the court denied the motion for a TRO and dismissed the case (without prejudice to DeBruce's right to seek redress before the Board). A copy of the court's decision is attached at Tab 2 (the "DeBruce Court Decision"). Much of the decision (pp. 4-9) addresses the court's jurisdiction. However, at pp. 9-10, the Court made the alternate finding that even if it had jurisdiction, DeBruce was not entitled to relief because it had not met any part of the standard for injunctive relief. That finding is highly pertinent as the Court decision addressed the same issues and claims that the Board must address in this proceeding.

II.

SECTION 721(b)(4) DOES NOT REQUIRE THE BOARD TO CONSIDER ONLY IRREPARABLE HARM

Section 721(b)(4) was added by the ICC Termination Act. It reads as follows:

> (b) **Inquiries, reports and orders** - The Board may -
>
> . . .
>
> (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of Title 5

The legislative history of this provision indicates that it was enacted as a substitute for the ICC's power to suspend rates. The Joint Conference Committee Report states as follows:

> "To replace the prior power to suspend and investigate rates under former section 10707, the new Board is specific empowered under section 721(b)(4) to grant administrative injunctive re' to address imminent threats

of irreparable harm." H. Conf. Rpt. 104-422 p. 170; 1995 U.S. Code Conf. & Admin. News, p. 855.

As can be seen, the statute speaks only to the purpose of the order ("to prevent irreparable harm"), not to the standard to be applied in deciding whether to grant such relief. The Conference Report characterizes Section 721(b)(4) as "administrative injunctive relief," which suggests that the same standards be employed as are generally employed for injunctions. Also, the Conference Report indicates that the new section was intended to replace the ICC's suspension and investigation power under former 49 U.S.C. § 10707, which was subject to a standard very similar to the standard used by courts in deciding requests for injunctive relief.[2]

The way DeBruce is reading new Section 721(b)(4) would mean that the section has vastly expanded the Board's ability to regulate rail transportation as compared to the ICC's. Indeed, under DeBruce's view of Section 721(b)(4), the Board could issue on administrative injunction even if there were no violations of the Act's substantive provision (the practical consequence of eliminating the requirement for a "likelihood of success on the merit"). There is not a shred of support in the statute or its legislative history to support the notion that such a vast expansion of rail regulation was being enacted or was intended. In fact, such a construction would be contrary to the overall thrust of the ICC Termination Act, which was to reduce regulation of railroads, see

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[2] To obtain suspension under former § 10707, a protestant had to show that it was "substantially likely" that the protestant would prevail on the merits, that the proposed rate change would cause "substantial injury" to the protestant, and that because of protestant's "peculiar economic circumstances," an award of refunds do not protect the protestant, 49 U.S.C. § 10707(c) and (d) (repealed).

generally H. Rep. No. 104-311, p. 83, 1995 U.S. Code Cong. & Admin. News 793 ("The Bill substantially deregulates the rail and motor industries"); Ex Parte No. 529, Class Exemption for Acquisition and Operation of Rail Lines (not printed), served June 21, 1996, Chairman Morgan commenting (ICCTA described as "deregulatory").

III.

DEBRUCE HAS NOT MET THE STANDARD FOR ISSUANCE OF INJUNCTIVE RELIEF

As DeBruce itself recognizes, the normal standard applicable to the issuance of injunctive relief consists of four parts. These are (1) substantial likelihood of our success on the merits, (2) irreparable harm in the absence of the requested relief, (3) lack of harm to other parties if the temporary relief is granted, and (4) furthering the public interest. The decision in DeBruce's court case concluded that issuance of the temporary restraining order that DeBruce had sought would be inappropriate because the Court had "serious reservations" about all four elements (DeBruce Court Decision, p. 9). DeBruce has made no better a case for injunctive relief in this proceeding.

A. DeBruce Has Not Demonstrated A Substantial Likelihood That It Will Succeed On The Merits.

DeBruce is essentially making two major claims in its complaint. The first is that UP's current allocation practices violate the underlying tariff, UP Tariff 4051. The second is that UP's allocation practices violate various provisions of the Interstate Commerce Act, specifically Sections 11101(a), requiring service on reasonable request, 11121(a), requiring "safe and adequate car service" and "reasonable rules and practices on car service" and 10741(a), prohibiting "unreasonable discrimination."

1. The Alleged Tariff Violation.

DeBruce's contention that Tariff 4051 has been violated is based on two arguments. The first argument is that, under the portion applicable to the GFP program, "UP unequivocally guarantees that pool car orders will be filled within 15 days at most" (Motion, p. 3). The second argument is that the tariff requires that UP give equal priority to GFP and voucher car orders.

The argument that UP "unequivocally guarantees" GFP car orders under the tariff clearly has no merit. As discussed in Mr. Collier's reply statement, nothing like the words "unequivocally guarantee" appears anywhere in the tariff. The guarantee that the tariff makes (as opposed to DeBruce's characterization of it) is as follows:

> "Union Pacific will guarantee to furnish covered hoppers during the applicable shipping half-month period for all orders placed within the times specified above, and in the event of late delivery. Shippers may cancel the orders and claim a cancellation penalty of $250 per car from the Railroad, or will be given one of the following options (at Railroad's discretion):
>
> (1) Roll the car order into the following shipping half-month period on a guaranteed basis.
> (2) Waive the $250 penalty and roll the car order forward for delivery of cars at a future date."

On its face, the "guarantee" UP is making by this language is that it will either place cars during the specified shipping period or pay a $250 per car penalty (if the late orders are canceled). There is no rational way this can be characterized as an "unequivocal guarantee" no matter how many times DeBruce uses this term.[3]

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[3] Further, the UP's guarantee is somehow construed as an "unequivocal guarantee," the reciprocal shipper guarantee has to be similarly interpreted, a result which is clearly unreasonable and which was not intended (RVS Collier, p. 7).

There is similarly no merit in DeBruce's claim that the tariff requires that equal priority for GFP and voucher orders. Once again, there is nothing in the tariff that actually says that the two types of orders are to receive equal priority. What DeBruce is really arguing is that the tariff be interpreted to require equal priority, because the tariff requires UP to use "every reasonable effort" to fill both types of orders, and the guarantee language applicable to both is, according to DeBruce, is "identical." There are several problems with this argument.

First, if the tariff was intended to set the relative priorities of voucher and GFP orders, it would have said so in no uncertain terms (RVS Collier, p. 9). The absence of any language specifically setting relative priorities shows that the tariff was not intended to address this point.

Second, the "every reasonable effort" language that appears in the tariff provisions governing both the GFP and voucher programs does not address the key issue in this case -- what is UP to do when there aren't enough covered hopper cars available to satisfy all of the orders being made under these programs? The court itself recognized that there were a "myriad of ways to resolve this issue -- and all of the alternatives have significant impact on the nation's rail policy" (DeBruce Court Decision, p. 8). Put another way, the tariff may require UP to use "every reasonable effort" to supply cars ordered under the two programs, but it does not even address the question of what is "reasonable" when there are not enough cars to go around. UP believes that its current allocation practices, under which all orders are eventually filled in a sequence that is eminently fair, are a "reasonable" way to address this situation.

Third, contrary to DeBruce's argument, the guarantee language applicable to the GFP and voucher programs is not identical. The penalty provisions applicable to the guarantees are very different. For GFP orders, failure to meet the placement guarantee results in a penalty of $250 per car if the order is canceled. For voucher orders, failure to meet the placement guarantee results in a penalty of up to $400, and the underlying orders do not have to be canceled to collect the penalty (RVS Collier, p. 10). The penalty applicable to the voucher guarantee is much more severe than the penalty applicable to the GFP guarantee. Thus, under DeBruce's way of interpreting the tariff, voucher cars should have higher priority than GFP cars.

Fourth, the decision in DeBruce's court case expressly rejected DeBruce's argument that the tariff required GFP and voucher orders to be given equal priority, commenting that "there is no contractual requirement that all orders be treated on a pro rata basis."[4] The Board should similarly reject DeBruce's attempt to read such a requirement into the tariff.

Finally, the $250-per-car penalty applicable to GFP car orders represents liquidated damages. Indeed, the sublease agreement applicable to private cars in the GFP program expressly refers to the penalty provisions as "liquidated damage provisions" (VS DeBruce, Sublease Agreement Rider No. 1 attached as Exhibit 2, p. 8, section 3). As such, even if there has been some sort of violation of the GFP placement guarantee, as

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[4] The "contractual requirement" referred to in this quote was the tariff. The reason the court used this terminology is because, in the court case, DeBruce had characterized the tariff as a form of contract (DeBruce Court Decision, p. 3).

DeBruce is alleging, the only remedy available to DeBruce is the $250 penalty. Again, the court recognized this issue. The court made the following observation:

> "Finally, although there is no doubt that Defendant has failed to honor Plaintiff's orders, the Tariff provides for damages in this situation. It is not at all clear that Plaintiff can rely on the Tariff as grounds for further relief, so there is some doubt that Plaintiff will truly prevail on the merits" (DeBruce Court Decision, p. 10).

2. **The Alleged Statutory Violations.**

Little need be said about the statutory violations that DeBruce is alleging. Aside from making a few conclusory claims that UP has violated various statutory provisions, DeBruce does not attempt to show how UP has supposedly violated those provisions. As one example, DeBruce claims that UP has subjected DeBruce to "flagrant and unreasonable discrimination," but its only attempt to address any of the elements required for a violation of Section 10741 is to allege that some unspecified elevators are getting more cars than DeBruce (Motion, p. 4). That, without more, does not constitute unlawful discrimination.[1]

[1] The elements of unlawful discrimination under § 10741 would be that UP is treating DeBruce differently than other elevators for (1) performing a like and contemporaneous service, (2) in the transportation of a like kind of traffic, (3) under substantially similar circumstances. Further, even if these elements are shown, there is still no unlawful discrimination if the differences are occasioned by differences in transportation differences, including the cost of providing service, see Mr. Sprout USA v. U.S., 8 F.3d 118, 125 (2nd Cir., 1993).

B. **DeBruce Has Not Demonstrated That It Will Suffer "Irreparable Harm" If An Administrative Injunction Is Not Granted.**

The claims DeBruce is making to show "irreparable harm" are essentially the same claims that DeBruce made in the earlier court case. Here is what the Court had to say about these claims:

> "The Court is persuaded that Plaintiff will suffer harm if Defendant continues to prefer voucher orders over GFP orders; the Court is not persuaded that the harm is irreparable. Plaintiff can (and, to some extent, has) purchased vouchers to obtain rail service. Rail service is available from other providers; although this service may be more costly, the difference in price between this "cover" and rail service from Defendant constitute monetary damages. Finally, Plaintiff is entitled to damages under the Tariff if it cancels its orders. Ultimately, Plaintiff has not demonstrated that its remedies at law are deficient." (DeBruce Court Decision, pp. 9-10).

The same conclusions are warranted as to DeBruce's present attempt to show irreparable harm, something even DeBruce concedes is required for an injunction under Section 721(b)(4).[1] For example, Mr. DeBruce in his verified statement, claims that his firm is spending "thousands of dollars each day in an effort to buy vouchers" (VS DeBruce, ¶ 22, p. 7). While he goes on to claim that it is hard to get vouchers, if his firm is spending "thousands of dollars each day" to buy them, then it is buying a lot of vouchers (RVS Collier, p. 12-13). DeBruce can similarly "cover" for any lost purchase or sale opportunities, by entering into deferred purchase agreements with its suppliers, and buying sales contracts from other elevators. The costs of doing so represent money damages (Id.), which is not "irreparable" harm.

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[1] Much of the car supply information DeBruce is relying upon to support its claimed damages was already out of date when DeBruce filed its motion (RVS Collier, pp. 11-12).

C. The Relief DeBruce Is Requesting Is Likely To Harm Other Parties.

This issue has two dimensions to it: the harm that the requested relief would cause UP, and the harm that the relief would cause other shippers. DeBruce apparently does not even see either factor as an issue, as it fails completely to address them.

The decision in DeBruce's court case addressed the harm to UP:

> "As stated, Plaintiff is harmed by the unavailability of rail cars. However, granting an injunction will potentially subject Defendant to a flood of similar suits from others whose rights are governed by the Tariff. This is not meant to imply that the Court is motivated to protect Defendant from liability for its past actions; however, the Court should not order relief that requires Defendant to take actions that will expose it to further liability." (DeBruce Court Decision, p. 10).

Even more significant, however, is the harm the requested relief would cause other shippers. UP's allocation practices are a lawful and fair way of allocating the available grain car supply among its customers so that all orders are eventually filled. DeBruce's requested order would, by its terms, require UP to give GFP orders the same priority as voucher orders throughout its entire system. This is a change in UP's car allocation practices that will affect hundreds of grain shippers. Some shippers -- those holding voucher orders - will unquestionably be harmed as fewer of their orders are filled. Other shippers -- those holding GFP orders -- will benefit. With the exception of DeBruce, neither group of shippers are involved in this proceeding.

D. The Requested Relief Is Not In The Public Interest.

This is another issue that DeBruce has totally ignored. Undoubtedly, DeBruce will benefit from the relief it is seeking, but what is the effect on the public? As the decision in the DeBruce court case recognized "there is no way to insure that the

public interest will be served by any order that requires Defendant to prefer Plaintiff over other shippers" (DeBruce Court Decision, p. 10). If that is the case for an order that simply applies to DeBruce, it is true in spades to the relief DeBruce is seeking from the Board, which would require an immediate change in UP's car allocation practices for its entire rail system.

IV.

UP HAS NOT "RETALIATED" AGAINST DEBRUCE

DeBruce claims in charged language that UP is "retaliating" against it for bringing a court case against UP and complaining to the Board about UP's allocation practices. That is a serious charge. Where is the proof?

There is no proof because there has been no retaliation. DeBruce claims that it has been provided fewer cars than in the same period last year, that UP is supposedly delivering more cars to some unidentified other elevators than it is delivering to DeBruce, and that on the day of the court hearing (October 28), UP took 25 cars that had been "applied for delivery against Nebraska City orders" away from DeBruce and gave them to another shipper.

There is absolutely nothing retaliatory about any of this. DeBruce may well be getting fewer cars this year then it did last year - UP acknowledges that it has not been filling all of DeBruce's orders. If some other elevators in Nebraska are using more voucher orders than DeBruce, they could be getting a correspondingly larger number of cars on a current basis than DeBruce. These results flow naturally from the lower grain car supply UP has due to the reduction in its grain car velocity, and decisions UP has had to make

to allocate the shortfall. Undoubtedly, DeBruce is unhappy about the allocation decision we made, and it is entitled to express its views. But it does neither side any good to demonize the other with name calling, as DeBruce is doing with its claim of retaliation. Nothing UP has done is targeted at DeBruce -- its allocation policy is a systemwide measure.

That leaves the 25 Nebraska City cars. There is nothing to this incident. All that happened was that UP exchanged one group of 25 cars for another group of 25 cars to avoid some switching. UP tried to deliver the new group of cars to DeBruce's Nebraska City facility on October 31, four days before DeBruce filed its motion (RVS Collier, p. 11).

Finally, on November 7, 1997, DeBruce's attorneys submitted a letter to the Board in Ex Parte No. 573 accusing UP of delivering cars to DeBruce "in order for UP to be able to refer to them in its letter." UP cannot be doing this and "retaliating" by withholding cars. The reality is that UP is doing neither. It is doing its best to fill car orders from its available car supply (RVS Collier, pp. 15-16).

V.

THE ORDER BEING SOUGHT BY DEBRUCE IS INAPPROPRIATE

The typical interim injunction involves a situation where a party is seeking an injunction to prevent another party from changing the status quo. This case, however, involves the opposite situation. DeBruce wants an injunction to change the status quo. Even if any relief were warranted -- which it is not -- it would be necessary that the order spell out with precision what changes UP is expected to make.

The only part of DeBruce's order which is reasonably clear is the first part, which requires UP to give the same priority to GFP orders and voucher orders systemwide. While it may be clear it is not appropriate. All that this case involves is one shipper who believes it is not getting sufficient cars. A summary "remedy" requiring systemwide changes in allocation practices affecting hundreds of shippers throughout the western United States is, to say the least, overbroad.

The rest of DeBruce's proposed order is so vague as to make compliance impossible. The restraining order DeBruce sought in its earlier court case, while somewhat different than the order sought here, had the same problem. The court cited the imprecision of the earlier version of DeBruce's proposed order as a reason for not granting it, stating "the Court is concerned that it does not know what it should order Defendant to do or not do" (DeBruce Court Decision, p. 10).

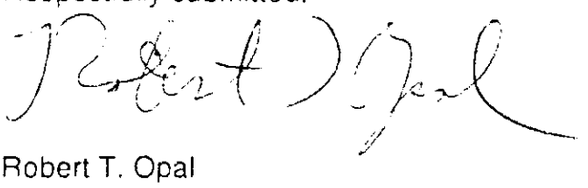
DeBruce is proposing that UP be required to place covered hopper cars at its Nebraska facilities "with the same level of responsiveness as it is currently placing cars at other elevators in the vicinity." The same requirement would apply to moving loaded cars. What does this phrase mean? What is a "level of responsiveness" and how is it measured? Do different "levels of responsiveness" on different days violate the order? What elevators are "in the same vicinity," and what is the criteria for determining the comparison group? In short, this proposed order does not tell UP what it should do or should not do. All that it would do is to give DeBruce, and potentially all UP grain customers, a basis to argue that, whatever UP did or did not do, it would be violating the order.

VI.

CONCLUSION

For the reasons stated above, DeBruce has failed to show that it is entitled to any relief under 49 U.S.C. § 741(b)(4). Accordingly, DeBruce's motion for emergency order should be denied in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon counsel for complainant shown below:

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Service was made by UPS overnight delivery with postage prepaid.

Dated at Omaha, Nebraska, this 13th day of November, 1997.

Robert T. Opal